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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina	)	CC Docket No. 97-208

REPLY COMMENTS OF THE

COMPETITION POLICY INSTITUTE

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I. INTRODUCTION

The Competition Policy Institute (CPI) respectfully submits these reply comments on the Application by BellSouth Corporation to provide in-region, interLATA services in South Carolina. CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

CPI supports those commenters, such as the Consumer Advocate for South Carolina, and others, that urge the Federal Communications Commission (FCC, or Commission) to deny BellSouth's application. BellSouth has not demonstrated that its application is appropriate under section 271(c)(1)(B) ("Track B"). Further, BellSouth's application does not satisfy the requirements of section 271(c)(1)(A) ("Track A"). Finally, BellSouth's application does meet the public interest standard. While this application does not fall within the bounds of Track B, CPI makes some suggestions concerning the Commission's approach to the public interest standard under Track B, should the Commission choose to provide some guidance to future applicants in this proceeding.

II. BELLSOUTH IS NOT ELIGIBLE TO APPLY FOR INTERLATA SERVICE IN SOUTH CAROLINA UNDER TRACK B.

CPI agrees with those commenters who assert that BellSouth does not qualify for consideration under Track B. BellSouth is ineligible to apply under both letter and the spirit of the legislative language of Track B.

As a legal matter, BellSouth has neither alleged nor demonstrated that it meets the

requirements of Track B. Under the statute, Track B is only to available to BellSouth if it has not received a single request for access and interconnection described in section 271(c)(1)(A) from "such provider" prior to June 30, 1997. BellSouth admits that it has received requests for access and interconnection from between 83 and 154 potential competitors in South Carolina prior to June 30, 1997.[1] In order to satisfy Track B, BellSouth must demonstrate that none of these requests for access and interconnection have originated from "such provider".

In its decision denying SBC's application to provide interLATA service in Oklahoma,[2] the FCC defined "such provider" as "a *potential competing provider* of the telephone exchange service described in section 271(c)(1)(A)." (emphasis added.) Thus, the Commission rejected the notion that the requesting carrier must already be operational; Track B is foreclosed if the qualifying request comes from a carrier that is planning to compete with BellSouth in the future.

In the same Order, the Commission rejected the notion that "any" request from a potential competitor forecloses Track B. The Commission concluded that "the request from a potential

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[1] BellSouth states in its application that it has "executed agreements with 83 different telecommunications carriers in South Carolina." BellSouth Application, p. 5. In addition, the attached affidavit of Mr. Gary Wright indicates that BellSouth is currently involved in negotiations with 71 additional companies. Wright Aff., p. 3. While it is difficult to know from this information exactly how many requests for access and interconnection were received prior to June 30, 1997, CPI believes that it is reasonable to assume the number of requests received prior to June 30, 1997 lies somewhere between 83 and 154. To the extent that this assumption is incorrect, the fault lies with BellSouth for failing to provide this highly significant information to the Commission and commenting parties in its Application.

[2] Memorandum Opinion and Order, Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC No. 97-121 (rel. June 26, 1997) ("SBC-Oklahoma Order").

competitor must be one that, if implemented, will satisfy section 271(c)(1)(A)." SBC-Oklahoma Order, para 54. The Commission acknowledges that this approach requires the Commission "to engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A)," but finds that this "type of judgment is required" by the statutory language. SBC-Oklahoma Order, para. 57.

Under section 271(c)(1)(B), Track B is foreclosed once the Bell Operating Company (BOC) receives a single "request" for access and interconnection described in subparagraph (A). Under the SBC-Oklahoma Order, the relevant question is whether the carrier making the request intends to offer facilities-based service to business and residential customers at the time of the request, not whether the carrier is already offering service. Thus, in determining whether Track B is applicable, BellSouth must allege and demonstrate, and the Commission must find, that none of the 83 to 154 requests that have been submitted to BellSouth in South Carolina are qualifying requests from "such provider". If any one of these requests could, "if implemented, . . . satisfy section 271(c)(1)(A)", then BellSouth is not eligible to apply under Track B.

BellSouth, however, does not make this allegation or this demonstration. BellSouth never states that none of these 83 to 154 requests is for access and interconnection that, if implemented, would allow that competitor to serve business and residential customers using predominantly its own facilities. For this reason, the BellSouth application does not qualify for Track B on its face.

Rather than comply with the statutory language and the FCC's interpretation of that language in the SBC-Oklahoma Order, BellSouth instead sets forth a different standard for interpreting when Track B applies (a standard that has no basis in the statutory language) and then maintains that competitors have not met this new standard. BellSouth points to the South Carolina Public Service Commission (SCPSC) statement that "none of [BellSouth's] potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residential customers in South Carolina." (BellSouth Application, p. 8) BellSouth then argues that, since none of the three carriers that have installed their own facilities currently serve residential customers, no carrier has taken "reasonable steps" toward providing the type of service described in Track A, and Track B is thus available. But this "reasonable steps" standard is not the standard set forth by the statutory language or by the Commission.

The Department of Justice (DOJ) appears to make a similar error in its comments on the BellSouth application. The DOJ finds that it is unable to decide whether BellSouth is eligible to apply under Track B because there is "very little evidence before the Commission at this time on which to evaluate DeltaCom's intentions and efforts to provide residential service." (DOJ Comments, p. 11). Again, however, whether a carrier is providing residential service at the time of BellSouth's application is irrelevant to the statutory language. The relevant question is whether a carrier has requested "access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A)." Furthermore, the DOJ fails to analyze the other

requests to determine whether they requested access and interconnection that, if implemented, would allow the carrier to provide the type of service described in Track A.

The source of this confusion is paragraph 58 of the Commission's SBC-Oklahoma Order. In that paragraph, the Commission noted that it

> will not allow potential competitors to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A. Indeed, in some circumstances, there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A).

The "reasonable steps" language is simply a suggestion made by the FCC in an example of how it might consider an application that has been refiled by a BOC. BellSouth attempts to elevate this suggestion to a standard governing all Track B applications. There is no reason that this suggestion for refiled applications, which appears once in the entire SBC-Oklahoma Order, should replace the "if implemented" standard, which the FCC discusses over 16 pages in that same Order.

CPI understands the need for the Commission to protect against "gaming" by carriers who might submit a request for access and interconnection and then fail to provide service. Nevertheless, CPI questions whether the Commission has the legal authority to implement a "reasonable steps" standard, since this approach has no support in the statutory language. To the extent that the Commission and others are concerned about "gaming" (in other words, that carriers would request access and interconnection and then delay the provision of service), this

concern is addressed by the Commission's decision not treat every request for access and interconnection as a qualifying request. "Gaming" is further precluded by the exception that allows a BOC to file under Track B if a competitor fails to comply, within a reasonable time, with the implementation schedule set forth in the interconnection agreement.

In short, the Commission never stated that it would consider whether competitors have taken "reasonable steps" toward providing service using its own facilities to residential and business customers to determine whether the Track B requirements are met.

Nor should it. If a carrier has requested access and interconnection that, when implemented, will allow the competitor to provide service to business and residential customers, then it is clear that competitors are seeking to enter the market. Track B is not intended to apply to markets in which competitors are seeking and planning to compete. According to BellSouth's application, at least 154 competitors have requested access and interconnection. (Wright Affidavit, p. 3) BellSouth has reached agreements with 83 of these requesters. (Application, p. 5) Nine competitors have sought certification from the SCPSC to provide competitive local exchange services in South Carolina. Clearly, this is not a state that competitors are ignoring. From this evidence, there is every reason to believe that competition can be expected to come to South Carolina, even if it has not arrived yet. Track B simply was not intended to apply in states where competition is likely to become a reality.

At the end of the day, BellSouth's application suffers from the same problem as SBC's Oklahoma application. There, the FCC found that

> it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application. In this regard, we find it of great significance that, in its application, SBC does not argue that none of the requests it has received will lead to the type of telephone exchange service described in section 271(c)(1)(A).[3]

Similarly, BellSouth does not allege that none of the requests it has received will lead to the type of telephone exchange service described in Track A. BellSouth instead maintains that none of the competitors operating in South Carolina are currently providing that type of service. In this regard, BellSouth is in the same position as SBC. The FCC found that "SBC contends that the only relevant determination for the purposes of section 271(c)(1)(B) is whether it has received a request for access and interconnection from an already competing provider of such service." The FCC specifically rejected this approach in the SBC-Oklahoma Order, stating, ". . . the current absence of competing residential service in Oklahoma does not, on the record before us, mean that 'no such provider has requested the access and interconnection described in [section 271(c)(1)(A)].'"[4] Thus, under the precedent set in the SBC-Oklahoma Order, it is irrelevant whether any potential competitor was taking any reasonable steps towards providing facilities-based competition to business and residential customers three months before its application. BellSouth is not eligible to apply under Track B because BellSouth has not alleged, let alone demonstrated, that no potential competitor "has requested the access and interconnection

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[3] SBC-Oklahoma Order, para. 60.

[4] SBC-Oklahoma Order, para. 64.

described in subparagraph (A)."[5]

Further, even if the Commission adopts BellSouth's proposed "reasonable steps" approach, BellSouth has not made its case. BellSouth limits its discussion to the three carriers that "have placed self-provided facilities in South Carolina." (BellSouth Application, p. 13). BellSouth then argues that, while each of these three carriers have invested in fiber optic facilities, none of these carriers has taken reasonable steps to providing residential competition. Whether or not this is accurate, it is clear that BellSouth is limiting its discussion to carriers that invested in facilities separate and apart from BellSouth's network. As AT&T points out,

> the Commission has squarely held that unbundled network elements obtained from a BOC qualify as a competitor's "own" facilities for purposes of section 271(c). Ameritech Michigan Order ¶ 101. The BellSouth/SCPSC Compliance Order simply never discusses, let alone refutes, the overwhelming evidence that AT&T has sought UNE-based entry in South Carolina." (AT&T Comments, p. 7.)

BellSouth's application contains no discussion of the other 23 carriers that have reached interconnection agreements and indicated that they might provide facilities-based local exchange services. Especially given that the resale discount in South Carolina is one of the lowest in the country, it is highly likely that at least one of these 23 carriers is seeking to enter the South Carolina market through the use of unbundled network elements, which the FCC treats as a carrier's own facilities. If a single one of these 23 carriers has taken reasonable steps to providing business and residential service using unbundled elements, then BellSouth is precluded from applying under Track B even under the standard that it has proposed. Since BellSouth's

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[5] 47 U.S.C. §271(c)(1)(B).

application does not discuss these other 23 carriers, it has not satisfied its burden of demonstrating that Track B is available to it.

III. BELLSOUTH'S APPLICATION DOES NOT QUALIFY UNDER TRACK A, IN PART BECAUSE CONSUMERS IN SOUTH CAROLINA DO NOT HAVE A REALISTIC CHOICE FOR LOCAL TELEPHONE SERVICE.

BellSouth's application fails the Track A test in several regards. For one, Track A requires that a carrier be serving business and residential customers using its own facilities. Yet the statement by the SCPSC that no competitors are taking any reasonable steps towards implementing facilities-based competition to business and residential competitors is in itself a strong indication that Track A is not satisfied.

Further, CPI supports the comments of the Consumer Advocate for the State of South Carolina, Philip S. Porter, (SC Consumer Advocate) that BellSouth's application is not in the public interest. In particular, the SC Consumer Advocate suggests that "the primary focus for this Commission in evaluating the public interest test should be whether consumers in South Carolina have a realistic choice for local telephone service." The SC Consumer Advocate finds that, "in examining the record in this case, it is clear that competition for local service in BellSouth's service territory is virtually non-existent, even on a resale basis. Consumers do not have a realistic choice of local service providers." (SC Consumer Advocate Comments, p.9)

CPI has previously voiced its support for the "realistic choice" standard in reviewing BOC applications to provide long distance. (A copy of CPI's ex parte filing in the Ameritech-Michigan docket is attached to these reply comments.) As the SC Consumer Advocate points out, consumers are only likely to benefit from the entry of the BOC into long distance when they

have a choice for local service. The ability of the consumer to choose an alternative carrier will give the BOC market incentives to operate more efficiently, pass on these efficiency gains to consumers, and offer lower rates and higher quality of service. Since both the SC Consumer Advocate and the SCPSC find that there is little if no choice available to consumers in South Carolina, CPI believes that BellSouth's application fails the public interest test under Track A.

IV. THE COMMISSION SHOULD RETAIN A CONSUMER FOCUS WHEN CONSIDERING THE PUBLIC INTEREST FOR LEGITIMATE TRACK B APPLICATIONS.

As CPI mentions in the attached ex parte, however, CPI does not believe that the "realistic choice" approach is appropriate if the Commission decides to consider the BellSouth application under Track B. Since Track B was, in general terms, intended to apply in States where no competition is developing, it would be unfair to the BOC and contrary to Congressional intent for the Commission to require a showing that consumers have a realistic choice of alternative local providers in a legitimate Track B application.

Instead, for Track B applications, CPI suggests that the Commission consider whether consumers are receiving other benefits as part of the public interest test. CPI believes that the Commission should use the public interest test in both Track A and Track B applications to focus of the needs of consumers, rather than carriers. The public interest test must mean something more than compliance with the competitive checklist in part because an amendment to equate the public interest test with the completion of the checklist was defeated on the Senate floor. In Track B applications, if local competition is not developing in the State, then the Commission should look for other consumer benefits. Factors that the Commission could consider under the

public interest test for Track B applications include the following:

- the BOC's rates for local telephone service in the state, and the effect of the BOC's entry into long distance on those rates;
- the benefits that the BOC's entry into the interLATA market will bring to consumers in that state;
- the local telephone service quality being provided by the BOC in that state, and the effect of the BOC's entry into long distance on service quality;
- compliance by the BOC with state and federal rules in that state;
- the availability of intraLATA toll dialing parity, and intraLATA toll competition, in that state;
- whether other measures have been taken to make it more likely that competition will develop in that state in the future; and
- other factors affecting the welfare of local telephone consumers and competition.

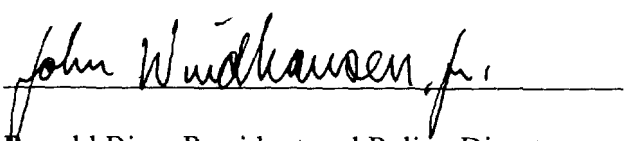
No one of these factors should necessarily determine whether or not the BOC's application satisfies the public interest test; the Commission should not add to the checklist by making any of these factors a necessary precondition to approval. Nevertheless, it is perfectly appropriate for the Commission to examine the state of telephone service in that state from a consumer perspective under the broad public interest umbrella. Further, Commission consideration of these factors would provide the BOC with additional incentives to provide high-quality, low-priced service to consumers. Since section 271 is premised, in part, on the idea that BOCs should be provided with incentives to open their market to competition, consideration of the factors identified above when reviewing a Track B application would be consistent with Congressional intent.

V. CONCLUSION

For all of the reasons set forth above, CPI supports those commenters who maintain that BellSouth has not demonstrated or alleged that it is eligible to apply under Track B. Further,

since consumers in South Carolina do not have a realistic choice for local telephone service, and for other reasons, BellSouth's application does not qualify under Track A. For these reasons, CPI believes the BellSouth South Carolina application should be denied.

Respectfully Submitted,



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CPI Competition Policy Institute

THE COMPETITION POLICY INSTITUTE'S "REALISTIC CHOICE" APPROACH TO THE PUBLIC INTEREST STANDARD

1. Each Bell Operating Company (BOC) application to provide long distance service must meet the "competitive checklist" and the "public interest" test. Thus, the public interest must mean something more than the "checklist". (An amendment on the Senate floor to equate the public interest test with completion of the competitive checklist was defeated.)

2. While the "competitive checklist" measures competition from the perspective of the carriers, the public interest test offers the FCC the opportunity to examine the question of BOC entry into long distance from the perspective of consumers.

3. In applying the public interest test, the FCC should examine all factors that affect whether approving a section 271 application would benefit consumers. These factors include whether consumers have a **realistic choice** for local telephone service, whether BOC entry into long distance will help to lower long distance rates, whether BOC entry into long distance will raise local rates, and many others.

4. Of these factors, CPI believes that the Commission should give primary importance, or "substantial weight", to whether consumers in the state have a **realistic choice** of alternate local telephone providers before BOC entry into long distance is granted.

5. The **realistic choice** approach allows the FCC to conduct a "reality check" of the local telephone marketplace to ensure that its decision on BOC entry is not based entirely on legalities. The **realistic choice** approach allows the FCC to examine whether the local telephone market is truly functioning in a manner that allows consumers to choose an alternate local service provider before BOC entry into long distance is granted.

6. The availability of a **realistic choice** for consumers of local telephone service is critically important to any long distance application for several reasons:

   a) The availability of a **realistic choice** is the best way to determine that all the barriers to local competition have been removed. The best proof that the market is open is if competitors are actually entering the market and consumers have a **realistic choice** of alternate carriers.

   b) If consumers have an opportunity to choose an alternate local provider, the BOC's incentives to raise local rates or engage in anticompetitive conduct will be greatly reduced. In other words, consumers are likely to benefit from BOC entry into long distance only if the BOC has competitive pressures to pass on these benefits to consumers.

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c) The benefits to consumers of adding one additional competitor for local telephone service (essentially doubling the number providers) are far greater than the benefits of adding one more long distance competitor (the BOC) to a market of over 400 long distance companies.

7. If, rather than adopt CPI's **realistic choice** standard, the FCC adopts the DOJ's "irreversibly opened to competition" standard, the FCC must examine ALL factors that affect whether a market is open to competition. For instance, the FCC must take into account actions by the BOCs to delay competition that are not included in the checklist (such as PIC-freezes, withholding billing information, the lack of intraLATA toll dialing parity, locking customers into long-term contracts, etc.) AND must take into account practices of other entities (such as excessive municipal regulation of new entrants and actions by landlords of multiple dwelling units) to determine whether a market is truly open. Several cities in Michigan, for instance, have taken action that discourages competition.

Since it is an "end results" test, the **realistic choice** approach is much simpler to administer.

8. The **realistic choice** approach is:

a) NOT a market share test. The **realistic choice** standard measures whether consumers can choose a competitor, not whether they have subscribed to a competitor.

b) NOT adding to the competitive checklist. The FCC should not use the **realistic choice** standard as a precondition to interLATA entry in the same way that checklist items are preconditions. Whether consumers have a **realistic choice** is one factor, albeit the most important factor, of several that the FCC should consider as part of its public interest analysis.

9. As part of a **realistic choice** approach, the FCC should examine:

a) whether urban, suburban and rural customers have a realistic choice;

b) whether large businesses and small businesses have a realistic choice;

c) whether residential customers in apartment buildings and residential customers in single-family homes have a realistic choice;

d) whether competitors are available in one location or throughout the state.

e) whether high-income subscribers, middle-income subscribers and low-income subscribers have a realistic choice.

It is not necessary for the Commission to find that every one of these categories of consumers have a **realistic choice** available to them. The Commission should gather

evidence for each of these subgroups. The more categories of consumers that have a **realistic choice**, the more likely the BOC application would satisfy the public interest.

10. Given that there are already well over 50 local telephone competitors unaffiliated with long distance companies, it is inconceivable that they would all collude to delay their entry into the local market simply to keep the BOCs from receiving interLATA approval.

Certificate of Service

I, Bridget J. Szymanski, hereby certify that on this fourteenth day of November, 1997, copies of the foregoing Comments of the Competition Policy Institute were served by hand or by first-class, United States mail, postage prepaid, upon each of the following:

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